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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. .....

DOUGLAS WARE, A MINOR REPRESENTATIVE,
BY HIS FATHER, MARSHALL WARE, et al,
Petitioner,

v.

NOLAN ESTES, SUPERINTENDENT OF THE
DALLAS PUBLIC SCHOOLS, et al,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner Douglas Ware respectfully prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 19, 1972.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals appears in the Appendix hereto along with the memorandum opinion rendered by the District Court of the Northern District of Texas.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 19, 1972. A timely petition for rehearing was denied on June 15, 1972, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the use of corporal punishment in the Dallas Independent School District deprives both the children-students and/or their parents of fundamental liberties secured to them under the due process clause of the fourteenth amendment of the United States Constitution.

2. Whether the use of corporal punishment in the Dallas Independent School District deprives the children-students of rights secured to them under the ninth amendment to the United States Constitution.

3. Whether the use of corporal punishment in the Dallas Independent School District deprives the children-students of procedural due process in

violation of the fourteenth amendment to the United States Constitution.

4. Whether the infliction of corporal punishment upon children-students in the Dallas Independent School District constitutes cruel and unusual punishment under the eighth and fourteenth amendments to the United States Constitution.

5. Whether the infliction of corporal punishment upon children-students in the Dallas Independent School District constitutes deprivation of the child's right to equal protection of the laws under the fourteenth amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. CONST. amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U. S. CONST. amend. IX:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U. S. CONST. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall bridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

Vernon's Annotated Texas Penal Code, Art. 1142:

Art. 1142 LAWFUL VIOLENCE

Violence used to the person does not amount to an assault or battery in the following cases:

1. In the exercise of the right of moderate restraint or correction given by law to the parent over the child, the guardian over the ward, the master over his apprentice, the teacher over the scholar.

2. To preserve order in a meeting for religious, political or other lawful purposes.

3. To preserve the peace, or to prevent the commission of offenses.

4. In preventing or interrupting an intrusion upon the lawful possession of property.

5. In making a lawful arrest and detaining the party arrested, in obedience to the lawful order of a magistrate or court, and in overcoming resistance to such lawful order.

6. In self defense, or in defense of another against unlawful violence offered to his person or property.

7. Where violence is permitted to effect a lawful purpose, only that degree of force must be used which is necessary to effect such purpose.

STATEMENT OF THE CASE

A class action was brought in the United States District Court for the Northern District of Texas

pursuant to the Civil Rights Act, 42 U.S.C. § 1983 (1971). The suit was brought on behalf of children-students of the Dallas Independent School District as representative of a class of all those students and parents who were opposed to the use of corporal punishment in the public schools. The class did not include those students and parents who favored the use of corporal punishment by the School Board. Equitable relief was sought to prevent the school district from continuing to inflict corporal punishment upon the children-students without their permission or their parent's consent, and without effective procedural safeguards prior to such infliction. The school district's policy was challenged on the grounds that both the children-students and their parents were deprived of rights secured to them under the eighth, ninth, and fourteenth amendments to the United States Constitution.

The District Court rendered judgment for the Defendant-Respondents on the basis that (1) the claims were not substantial, and (2) the use of corporal punishment had a reasonable relationship to an educational goal which outweighed any parental rights. See Appendix A. The Court of Appeals affirmed the District Court's holding per curiam without opinion. See Appendix B.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW IS IN CONFLICT WITH PAST DECISIONS OF THIS

COURT AND HAS OVERLOOKED THE ESSENTIAL, FUNDAMENTAL AND BASIC IMPORTANCE OF THE ISSUES INVOLVED.

This Court has on more than one occasion recognized that marriage involves interests of basic importance in our society. See, e.g. *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma*, 316 U.S. 535 (1942). This Court has long recognized the concept that the parents of school children have a fundamental right to bring up their offspring according to their own precepts and convictions. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), this Court gave the following statement concerning the meaning of liberty:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to . . . marry, establish a home and *bring up children* . . . 262 U.S. at 399. (emphasis added)

The *Meyers* case is even more appropriate to this petition because it dealt with the parent's relationship with the schools. This Court held that liberty within the due process clause of the fourteenth amendment included the right of parents to send their children to a public school which taught languages other than English.

The rights of parents under the fourteenth amendment to raise their children unencumbered

by the state was dealt with again in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). This Court held that liberty includes the right of parents to send their children to private schools as well as public schools. In *Pierce*, this language was directed to the liberty of parents to bring up their children:

> The child is not the mere creature of the state; those who nurture him and direct his destiny have the right coupled with the high duty, to recognize and prepare him for additional obligations. 268 U.S. at 535

In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the question was considered whether the state could validly interfere with the guardian's right to exercise authority over the ward. A child labor law forbade the street sale of religious tracts by a ward. In the context of its opinion, this Court stated:

> It is cardinal with us that the custody, care and nurture of the child resides first in the parents whose primary function and freedom include preparation for obligations the state can neither supply nor hinder ... and it is in recognition of this that these decisions *(Pierce, Meyer)* have respected the private realm of the family. 321 U.S. at 166.

The fundamental nature of parents' liberties under the Constitution which evolved from the Court's decisions in *Meyer*, *Pierce*, and *Prince*, are still recognized by this Court today. These cases were cited with approval in *Griswold v. Connecti-*

cut, 381 U.S. 479 (1965), and during this Court's last term, in *Stanley v. Illinois*, 405 U.S. 645 (1972), the basic nature of a parent's right in his children was again emphasized. The Court stated:

> It is plain that the interest of a parent in the companionship, care, custody and management of his or her children 'come(s) to this Court with the momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' 405 U.S. at 651, *citing Kovacs v. Cooper*, 336 U.S. 77 (1949).

The Court went on to underscore the importance of the family unit by saying:

> The Court has frequently emphasized the importance of the family. The rights to conceive and raise one's children have been deemed "essential," *Meyer v. Nebraska*, 262 U.S. 390 (1923), "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535 (1942), and "[r]ights far more precious ... than property rights," *May v. Anderson*, 345 U.S. 528 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom includes preparation for obligations the state can neither supply nor hinder", *Prince v. Massachusetts*, 321 U.S. 158 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska, supra*, at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma, supra*, at 541, and the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, (1965) (Goldberg, J., concurring). 405 U.S. at 651.

Finally, in *Board of Regents v. Roth*, 33 L.Ed.2d 548 (1972), this Court quoted the principle from *Meyer* that while the Supreme Court has not attempted to define with exactness the term of liberty, it, without doubt, denotes the right of the individual to marry, establish a home and bring up children as essential to the orderly pursuit of happiness by free men. This Court, in *Stanley, supra*, enunciated the basic principle that the parent's interest in his children undeniably warrants deference and, absent a powerful countervailing interest, protection. 405 U.S. at 651.

The decisions of this Court can leave no doubt that the parent's interest in his children is of basic and fundamental importance in our society. The decisions by the Court of Appeals for the Fifth Circuit and the District Court have completely misinterpreted this Court's past holdings and overlooked the basic importance of the issues involved. The misapplication of the principles evolved by this Court puts the decisions of the lower Courts in direct conflict with the past holdings of this Court. Petitioners herein seek the granting of this writ so that the principles laid down by this Court pertaining to the right of a parent in his children will be given the sustenance and effect that they were intended when handed down by this Court.

2. THE DECISION BELOW RAISES SERIOUS CONSTITUTIONAL QUESTIONS

WHICH THIS COURT NEEDS TO DELINEATE CONCERNING THE RIGHTS OF STUDENTS WHEN PLACED INTO THE CONSTRUCTIVE CUSTODY OF THE SCHOOL BOARDS OF THIS NATION.

This Court, in *In Re Gault*, 387 U.S. 1 (1967) stated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." 387 U.S. at 13. The concept under which *Gault* was decided was further expanded in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). This Court held in *Tinker* that students have rights under the first amendment to the Constitution to express their beliefs in public schools by wearing arm bands. Mr. Justice Fortas, writing for the majority, stated that students in schools are just as much persons under our Constitution as they are when out of school. The underlying principle of these two cases is that students enrolled in our public schools have rights under the Constitution despite their status as juveniles. While the Court in *Gault* and *Tinker* laid down the basic principle that juveniles and students in our public schools have rights secured to them under the Constitution, the nature of those rights and the provisions of the Constitution by which they are protected has not been delineated by this Court.

The important questions of what is the nature and the magnitude of the rights said to be pos-

sessed by students have been effectively shown by the tremendous increase in litigation that has taken place in this area in the federal courts over the past five years. Students, alleging that they have been deprived of rights secured to them by the Constitution of the United States, have increasingly turned to the federal courts for an ajudication of those rights based primarily upon this Court's decisions in *Tinker* and *Gault*. These students have sought a declaration of their rights in the federal courts in connection with school board dress codes, hearings before suspension or expulsion from the public schools, and more particularly in the area of school board regulations governing acceptable hair length. The Court of Appeals and the District Courts of this nation are in conflict in regard to the rights of students to wear their hair at any length or in any manner desired. *See* e.g., Students challenges that were successful: *Crews v. Cloncs*, 432 F. 2d. 1259 (7th Cir. 1970); *Griffin v. Tatum*, 425 F. 2d. 201 (5th Cir. 1970); *Richards v. Thurston*, 424 F. 2d. 1281 (1st Cir. 1970); *Breen v. Kahl*, 419 F. 2d 1034 (7th Cir. 1969) *cert. denied*, 398 U.S. 937 (1970); *Black v. Cothren*, 316 F. Supp. 468 (D. Neb. 1970); *Dunham v. Pulsifer*, 312 F. Supp. 411 (D. Vt. 1970); *Cash v. Hoch*, 309 F. Supp. 346 (W.D. Wisc. 1970); *Simms v. Colfax Community School Dist.*, 307 F. Supp. 485 (S.D. Iowa 1970); *Miller v. Gillis*, 315 F. Supp. 94 (N.D. Ill. 1969); *Westley v. Rossi*, 305 F. Supp. 706

(D. Minn. 1969); *Olff v. East Side Union High School Dist.*, 305 F. Supp. 557 (N.D. Cal. 1969). Students challenged hair regulations unsuccessfully in *Wood v. Alamo Heights Indep. School Dist.*, 433 F. 2d. 355 (5th Cir.) *aff'g per curiam* 308 F. Supp. 551 (W.D. Tex. 1970); *Stevenson v. Board of Educ.*, 426 F. 2d. 1154 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970); *Jackson v. Dorrier*, 424 F. 2d. 213 (6th Cir.), *cert. denied*, 400 U.S. 850 (1970); *Davis v. Firment*, 408 F. 2d. 1085 (5th Cir. 1969), *aff'g per curiam*, 269 F. Supp. 524 (E.D. La. 1967); *Ferrell v. Dallas Indep. School Dist.*, 392 F. 2d. 697 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968); *Jeffers v. Yuba City Unified School Dist.*, 319 F. Supp. 368 (E.D. Cal. 1970); *Southern v. Board of Trustees*, 318 F. Supp. 355 (N.D. Tex. 1970); *Carter v. Hodges*, 317 F. Supp. 89 (W.D. Ark. 1970); *Whitsell v. Pampa Indep. School Dist.*, 316 F. Supp. 852 (N.D. Tex. 1970); *Bishop v. Colaw*, 316 F. Supp. 445 (E.D. Mo. 1970); *Livingston v. Swanquist*, 314 F. Supp. 1 (N.D. Ill. 1970); *Gfell v. Rickelman*, 313 F. Supp. 364 (N.D. Ohio 1970); *Corley v. Daunhauer*, 312 F. Supp. 811 (E.D. Ark. 1970); *Brownlee v. Bradley County Bd. of Educ.*, 311 F. Supp. 1360 (E.D. Tenn. 1970); *Neuhaus v. Torrey*, 310 F. Supp. 192 (N.D. Cal. 1970); *Pritchard v. Spring Branch Indep. School Dist.*, 308 F. Supp. 570 (D. Tex. 1970); *Giangreco v. Center School Dist.*, 313 F. Supp. 776 (W.D. Mo. 1969); *Brick v. Board of Educ.*, 305 F. Supp. 1316 (D. Colo. 1969). The cases of *Breen v.*

Kahl, 419 F. 2d 1034 (7th Cir. 1969) *cert. denied*, 398 U.S. 937 (1970), and *Stevenson v. Board of Education*, 426 F. 2d 1154 (5th Cir.) *cert. denied*, 400 U.S. 957 (1970), are excellent examples of the divergent views that have been taken by the circuits of the rights of students when they enter into the custody of the public school districts. The Court of Appeals for the Fifth Circuit in *Stevenson* failed to find any constitutional merit in the students claims, and thus upheld hair regulation simply on the basis of a showing of some reasonable connection between the rule and the maintenance of an effective educational system. On the other hand, the Court of Appeals for the Seventh Circuit in *Breen* held that the right of a student to wear his hair whatever length he may desire is protected by either the first or the ninth amendment of the United States Constitution, and absent a showing of justification, the school authorities could not threaten to expel and/or expel students for violation of a regulation governing hair length. These cases are excellent examples of the difficulty which is facing the courts of appeals and the district courts of our nation regarding what, if any, specific constitutional protection is afforded students who enter into the custody and control of the public schools. The tangental issue which has caused confusion is if the student does have specific constitutional protections, what kind of showing the school board must make in order to override his interests.

The hair length cases undoubtedly occupy a peculiar position in the constitutional law area in lieu of the language in *Tinker*. The Supreme Court in 1968 in *Tinker* specifically disavowed the relevance of its decision to the hair style cases, 393 U.S. at 507-508. Yet in the same decision, the Court broadly stated the proposition that a student does not leave his constitutional rights at the schoolhouse door, 393 U.S. at 506. The relevance of the hair cases to the granting of this writ is that it points up the dilemma which the circuit courts and the district courts face when dealing with students who come into federal courts seeking to ajudicate their constitutional rights. This Court laid down the broad proposition that these students have rights to be ajudicated, yet no standards exist by which the same federal courts can judge the exact nature of these rights in the realm of the student-pupil. The spate of federal court cases dealing with hair are significant in this instance in that they point up the confusion which exists in the federal judiciary over the problem of students' rights and the need for this Court to clarify and define the broad proposition laid down in *Tinker* that these students have constitutional rights. The increase in the amount of student litigation in recent years emphasizes the need for this Court to clarify the problems surrounding the area of students' rights and give constitutional guidelines which the students and federal courts can be governed by.

This problem is further exemplified by this Court's decision in *Epperson v. Arkansas*, 393 U.S. 97 (1968). The proposition was advanced in *Epperson* that courts should not intervene in the resolutions of school system conflicts unless they directly and sharply implicate basic constitutional values. Presently, there are no guidelines by which courts can rely in deciding the question of whether or not basic constitutional values are at issue. The conflicting views taken by the courts regarding students' rights show that there is a gap in the proposition laid down in *Tinker* and the holding of the Court in *Epperson*. When a school case "directly" and "sharply" implicates basic constitutional values, and what "basic constitutional values" means are two questions which this Court should decide.

There are currently millions of pupils enrolled in the public school systems across this nation. It is of fundamental, national importance for this Court to determine the precise nature and scope of the constitutional protection which they are afforded. The granting of this writ will give this Court the opportunity to clear up the confusion which presently exists in this area of the law and specifically, give clarification to the language of this Court's holding in *Tinker v. Des Moines Independent Community School District.*

CONCLUSION

For the reasons set out above, Petitioners urge that this Writ of Certiorari be issued to review the judgment of the Fifth Circuit.

Respectfully submitted,

Fred Time
Counsel for Petitioners

LEGAL ARTS CENTER
600 Jackson Street
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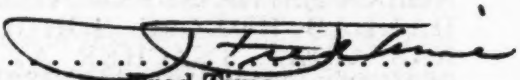
September 13, 1972

CERTIFICATE OF SERVICE

I, Fred Time, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing petition for Writ of Certiorari on counsel for Respondents by depositing same in the United States mail, postage prepaid, return receipt requested, on September ____, 1972, addressed to Mr. Warren Whitman, Counsel of Record for Respondents. I further certify that all parties required to be served have been served.



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APPENDIX A: *DECISION BY DISTRICT COURT*

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

DOUGLAS WARE, A MINOR REPRESENTATIVE BY HIS FATHER, MARSHAL WARE:
RODERICK OLIVER, A MINOR REPRESENTATIVE, BY HIS FATHER, ANDREW OLIVER

VS.

NOLAN ESTES, SUPERINTENDENT OF THE DALLAS PUBLIC SCHOOLS; WALTER KASPAREIT, TEACHER AT SUNSET HIGH SCHOOL; HAROLD FILGO, PRINCIPAL OF SUNSET HIGH SCHOOL; JACK LONDON, VICE-PRINCIPAL OF SUNSET HIGH SCHOOL; STACEY MOSELEY, TEACHER AT SARA ZUMWALT JR. HIGH SCHOOL; FREDERICK TODD, PRINCIPAL OF SARA ZUMWALT JR. HIGH SCHOOL and VAN MC CLELLAN, VICE-PRINCIPAL OF SARA ZUMWALT JR. HIGH SCHOOL

CIVIL ACTION

No. 3-4147-C

MEMORANDUM OPINION

In this suit the Court is called upon to resolve another conflict between the Constitution and the campus. The plaintiffs seek to restrain the defendants from administering corporal punish-

ment in the Dallas Independent School District without the prior permission of the parent or student on the grounds that it violates rights guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution. The cause is dismissed because the claims are not substantial.

The plaintiffs here undertake to represent a class consisting of all students and/or parents of students or those who may become parents or students in the Dallas Independent School District who are opposed to the use of corporal punishment as a method of discipline. The Court finds that this suit has been properly brought as a class action under Fed. R.Civ. P. 23(b).

According to the rules and policy of the Dallas Independent School District,

> "Principals are authorized to administer any reasonable punishment, including detention, corporal punishment, suspension for a period not to exceed ten school days at one time, or recommendation for expulsion from school."

The principal may delegate any of these duties to the assistant principal. The teacher is limited in his (her) use of corporal punishment.

> "Despite the best efforts of a teacher, there are students who cannot or will not control themselves and repeatedly disrupt the school program. These pupils are in serious need of guidance in progressing from the need for external controls to self-discipline and should

> be referred to the Pupil Personnel Committee for study. In the event the Committee determines that corporal punishment should be administered by the teacher it will be administered in the presence of an adult witness after receiving written permission from the child's parent."

After any corporal punishment has been administered, the principal is required to file a report with the assistant to the Associate Superintendent for Instruction.

The plaintiffs charge that any corporal punishment administered without parental or student consent deprives them of their rights to due process under the Fourteenth Ammendment because any utilization of corporal punishment is arbitrary, capricious and unrelated to any legitimate educational purpose. They also charge that this corporal punishment, on its face, constitutes cruel and unusual punishment in violation of the Eighth Amendment as applied to the States through the Fourteenth Amendment.

The evidence has shown that corporal punishment is usually administered by hitting the student on his buttocks one or several times with a paddle. The paddle is a piece of wood about 2 feet long, 1/4 to 1/2 inches thick, and 6 inches wide. There have also been incidents where the punishment has been administered with a tennis shoe. Plaintiffs have introduced testimony showing that corporal punishment has been administered by

teachers without parental permission and even after permission has been denied by the parent. One of the plaintiffs, Roderick Oliver, was knocked unconscious by an Assistant Principal when he allegedly directed an obscenity at the administrator.[1]

From the evidence presented, the Court has no doubt that the practice of corporal punishment has been abused by some of the seven thousand odd teachers in the Dallas Independent School District. This does not, however, show that the policy itself is unconstitutional.

Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, 67 L.Ed. 1042, 43 S.Ct. 625 (1922), the state cannot unreasonably interfere with the liberty of parents and guardians to direct the upbringing and education of children under their control. These parental rights are not beyond limitation. *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166, 88 L.Ed. 645, 652, 64 S.Ct. 438 (1943). In order for a deprivation of due process under the Fourteenth Amendment to occur, the rules and policies of the school district must bear "no reasonable relation to some purpose within the competency of the state." *Pierce v. Society of Sisters*, 268 U.S. 510, 530, 69 L.Ed. 1070, 1076, 45 S.Ct. 571 (1924).

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[1] That assistant principal was suspended from duties for several months and is now facing a criminal charge for assault upon a minor.

According to the testimony, it cannot be said that the Dallas Independent School District's policy on the use of corporal punishment bears no reasonable relation to some purpose within the competency of the state in its educational function. Dr. David Gil, an expert in education and social policy, testified that according to tests and studies he conducted there was a higher rate of delinquency among those children exposed to physical discipline than there was among children who were not physically chastised. It was his opinion that corporal punishment is always detrimental to a child's development. Dr. Robert Dane, an assistant professor of psychology at a nearby medical school, testified that there was evidence to show that corporal punishment makes it difficult for a child to develop; however, he also said that there was evidence to the effect that corporal punishment may be helpful to some children in the long run but not for the majority. Dr. Nolan Estes, Superintendent of the Dallas Independent School District, testified that the District's policy on corporal punishment was adopted after a conference with Professor B. F. Skinner of Harvard University, a recognized authority on child and educational psychology. Dr. Estes stated that the District's policy on corporal punishment reflects the philosophy of Dr. Skinner, i.e., in some cases corporal punishment will be helpful.

Dr. Estes testified further that it was the District's policy that corporal punishment be spar-

ingly used and only as a last resort. For this reason, it has to be recommended by a committee and approved by the parent before a teacher can utilize it. He stated that these prerequisites on the use of corporal punishment are not imposed upon the principal or assistant principal because he has more resources at his disposal to find out about the behavior and problems of the child than does the teacher. With this in mind, it is then left up to his professional judgment as to what he thinks is the best course of action. Dr. Estes said that this policy on corporal punishment was recommended to him also by the principals and the classroom teachers as the best interim measure at this time in light of the ultimate goal of complete self-discipline and individual education for the child.

It is not within this Court's function, or individual competence, to pass judgment upon the merits of corporal punishment as an educational tool or a means of discipline. The wisdom of the policy is not the Court's concern. The only judgment made is that the evidence has not shown this policy to be arbitrary, capricious, unreasonable or wholly unrelated to the competency of the state in determining its educational policy.

The plaintiffs have cited no authority for their allegation that they are somehow being denied due process except for the case of *Murphy v. Kerrigan*, CA No. 69-1174-W (D. Mass., June 2,

1970). That case was a consent decree whereby both parties agreed that corporal punishment would be banned in the Boston Public Schools so long as the current Boston School Committee is in office. Being a consent decree, it has little, if any, precedential value. Other than the *Meyer* and *Pierce* cases, wherein the rights of the parents are subject to the reasonable regulations of the state, the Court knows of no such constitutional right.

The parents in the case of *Cornwell v. State Board of Education*, 314 F.Supp. 340 (D.Md. 1969) aff'd 428 F.2d 471 (4th Cir. 1970), cert. denied ___ U.S. _____, made a similar claim to that made by the parents in this case, i.e., that it was within their rights as parents to teach their children about sexual matters in their own homes and that this exclusive right would prohibit the teaching of sex in the schools. The law was found to be a valid and reasonable public health measure which outweighed claims based upon religious freedom and the right of parental control. Similarly, the judgment of the school board in the case at bar, having been found to be not unreasonable, outweighs any claims based upon parental rights.

While the School District here is certainly not compelled to use corporal punishment, they are allowed to use it by Texas Statute. Tex. Pen. Code Ann. art. 1142 (1961) immunizes teachers from assault and battery charges in the exercise of the right of moderate restraint given by law to "the

teacher over the scholar" as well as "to the parent over the child." This statute has been construed as authorizing the school teacher to inflict moderate corporal punishment upon a pupil. *Prendergast v. Masterson,* 196 S.W. 246, 247 (Tex.Civ.App. Texarkana 1917, no writ) and *Dill v. State,* 87 Tex. Cr. R. 49, 219 S.W. 481, 482 (Tex.Crim.App. 1920).

> "The legislature [can] properly conclude that parents, and others, *teachers for example,* who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." [Emphasis added]. *Ginsberg v. New York,* 390 U.S. 629, 639, 20 L.Ed. 2d 195, 204, 88 S.Ct. 1274 (1968).

The Court does not find that corporal punishment as authorized by the state law and the rules of the Dallas Independent School District amounts to cruel and unusual punishment. It must be pointed out in this context that if the corporal punishment is unreasonable or excessive, it is no longer lawful and the perpetrator of it may be criminally and civilly liable. The law and policy do not sanction child abuse.

In closing this opinion, the Court feels compelled to utter a general precept in light of the many cases it has had to entertain in the recent past embodying allegations of constitutional violations by the local school district. The following quote will succinctly and accurately describe the Court's attitude with respect to these cases.

> "Judicial interposition in the operation of the public school systems of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." Epperson v. Arkansas, 393 U.S. 97, 104, 21 L. Ed. 2d 228, 234, 89 S. Ct. 266 (1968).

Plaintiffs' complaint is hereby DISMISSED.

SIGNED and ENTERED this 4th day of June, 1971.

W. M. Taylor
UNITED STATES DISTRICT JUDGE

APPENDIX B:
DECISIONS BY COURT OF APPEALS

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2875

DOUGLAS WARE, A Minor Representative, By His Father, MARSHAL WARE, ET AL,
Plaintiffs-Appellants,

versus

NOLAN ESTES, Superintendent of the Dallas Public Schools, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

---

(May 19, 1972)

Before DYER, Circuit Judge, SKELTON,* Judge, and INGRAHAM, Circuit Judge.

PER CURIAM: We are in agreement with the well considered memorandum opinion of the district court, *Ware v. Estes*, 328 F.Supp. 657 (N.D., Tex., 1971), and its judgment is AFFIRMED.

---

*Judge Byron G. Skelton, U.S. Court of Claims, sitting by designation.

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In the

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

October Term, 1971

No. 71-2875

D. C. Docket No. CA-3-4147

DOUGLAS WARE, A Minor Representative, By His Father, MARSHAL WARE, ET AL,
Plaintiffs-Appellants,

versus

NOLAN ESTES, Superintendent of the Dallas Public Schools, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

Before DYER, Circuit Judge, SKELTON,* Judge, and INGRAHAM, Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the

judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

May 19, 1972

Issued as Mandate: June 23, 1972

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*Judge Byron G. Skelton, U. S. Court of Claims, sitting by designation.

U. S. COURT OF APPEALS
FILED
JUNE 15, 1972
EDWARD W. WADSWORTH
CLERK

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 71-2875

DOUGLAS WARE, A Minor Representative, By His Father, MARSHAL WARE, ET AL,
Plaintiffs-Appellants,

versus

NOLAN ESTES, Superintendent of the Dallas Public Schools, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

---

(June 15, 1972)

ON PETITION FOR REHEARING

Before DYER, Circuit Judge, SKELTON,* Judge, and INGRAHAM, Circuit Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

---

*Judge Byron G. Skelton, U. S. Court of Claims, sitting by designation.

OPPOSITION BRIEF

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FILED

OCT 11 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-417

DOUGLAS WARE, A MINOR REPRESENTATIVE, BY HIS FATHER, MARSHALL WARE, et al,
Petitioner,

versus

NOLAN ESTES, SUPERINTENDENT OF THE DALLAS PUBLIC SCHOOLS, et al,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Warren Whitham,
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Attorney for Respondents.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

No. 72-417

DOUGLAS WARE, A MINOR REPRESENTATIVE, BY HIS FATHER, MARSHALL WARE, et al,
Petitioner,

versus

NOLAN ESTES, SUPERINTENDENT OF THE DALLAS PUBLIC SCHOOLS, et al,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (Petitioners Appendix "A") is reported at 328 F.Supp. 657. The opinion of the Court of Appeals for the Fifth Circuit (Petitioners' Appendix "B") is reported at 458 F.2d 1360.

QUESTIONS PRESENTED

All questions stated by Petitioners were not in issue in the District Court or the Court of Appeals. In answer to an inquiry from the Court, the Petitioners in the Dis-

trict Court limited the issues to whether corporal punishment in public schools were cruel and unusual punishment under the Eighth Amendment and whether Petitioners had been denied due process under the Fourteenth Amendment. (R. 65)[1] As the only constitutional questions before the Courts below were those arising out of an alleged violation of the Eighth Amendment and an alleged denial of substantive due process under the Fourteenth, then no questions are presented of deprivations of rights under the Ninth Amendment or of procedural due process rights or equal protection rights under the Fourteenth Amendment and Petitioners should not be heard to assert these questions in this Court.

STATEMENT OF THE CASE

This is a class action under the Civil Rights Act, 42 U.S.C. Section 1983, on behalf of two public school students claiming to be representatives of an alleged class of persons composed of students or parents of students who are opposed to the use of corporal punishment as a method of discipline in the school system in which the Respondent school superintendent, principals, assistant principals and teachers are employed. The Petitioner Students asserted in the District Court that corporal punishment is a deprivation of rights secured by the Eighth and Fourteenth Amendments. The Petitioner Students do not seek damages. Equitable relief only is sought seeking to restrain the Re-

[1]Petitioners have filed no record. In this brief references designated "R" refer to the pages of the Appendix printed as the record for the use of the Court of Appeals.

spondent school superintendent, principals, assistant principals and teachers from administering corporal punishment to the Petitioner Students and the alleged class they seek to represent. (R. 64) The District Court denied the relief sought and dismissed this action on its merits. The Court of Appeals affirmed.

The only Defendants in this action are the Respondent teachers, assistant principals, principals and the Superintendent of Schools employed by the Dallas Independent School District, sued only in their representative capacities as a teacher, assistant principal, principal or Superintendent of Schools. (R. 36) Neither the Dallas Independent School District nor its Board of Education nor its Trustees are made parties Defendant to this action. (R. 34, 36) The corporal punishment policy under attack is a policy of the Dallas Independent School District formulated by its Trustees as the Board of Education. (R. 113) The school system has some 7,000 teachers alone, plus 184 principals, not counting assistant principals. (R. 116, 117) In the Dallas school system an administrative intern assumes the role and acts as an assistant principal in the school to which assigned. (R. 119)

At the time of the trial, the Petitioner Student, Roderick Oliver, was sixteen years old. In May of 1970, he had been a student at Zumwalt Junior High School. (R. 66, 67)

The Respondent, McClellan, was Assistant Principal at Zumwalt Junior High School. The Respondent, Todd, was Principal at Zumwalt Junior High School. The

Respondent, Mosley, was first a teacher and later an administrative intern, acting as an Assistant Principal at Zumwalt Junior High School. (R. 78, 137, 70, 143, 144)

Roderick has been spanked five, six or seven times while at Zumwalt by Assistant Principal McClellan (R. 73)

While he was the wood shop teacher at Zumwalt, Mr. Mosley paddled Roderick and other boys for violating safety rules in the wood shop when the boys would be "horsing around" or "messing around" in disregard of appropriate safety standards in the shop. (R. 147, 70, 71)

Roderick considered Mr. Mosley to be one of his favorite teachers. (R. 70)

Roderick described these occasions when paddled by Mr. Mosley in the wood shop at Zumwalt in these terms:

"Q. Had Mr. Mosley spanked you before?
"A Yes, sir, I guess about a year before.
"Q. How was that?
"A. A long time.
"Q. How was that done?
"A. It was done, I guess, I could say in a joking manner, you know, it was in wood shop class. You know, the students in there, we used just mess around and he would paddle us and we were all grown and we would all laugh

about it. You know, it wasn't nobody getting mad or nothing. They all liked him.

"Q. You were spanked for punishment and you laughed it off?

"A. There wasn't no great spanking or no pressure, nothing like that behind it, you know." (R. 70, 71)

Roderick freely admits that at the times he received spankings, he knew what he was being punished for. (R. 67) Roderick admits that before each spanking or paddling he received at Zumwalt by either a teacher, assistant principal or principal, he was allowed to give an explanation for all his actions for which he was punished. (R. 68)

Roderick's mother has spanked him with a belt at home on more that one occasion. Roderick's father has spanked him with a belt at home on more than one occasion. (R. 72) Roderick's father admits to having used a paddle on his children at home (R. 76)

Roderick's father has given permission to the Dallas Independent School District, including its principals, teachers, and its Superintendent, Dr. Estes, to strike Roderick while he was in the Dallas Independent School District's jurisdiction. Mr. McClelland was the Assistant Principal and Mr. Todd, the Principal of Zumwalt Junior High School to whom such permission was given by Roderick's father. (R. 75, 78)

Roderick's father specifically authorized Mr. McClellan, the Assistant Principal, to administer punish-

ment to Roderick any time Mr. McClellan thought Roderick was justified in receiving punishment and Roderick's father specifically authorized spanking as included within the punishment authorized. (R. 79)

On May 5, 1970, it was Mr. Mosley's duty at Zumwalt to patrol the school halls and campus to keep non-student hoodlums off the campus and out of the building at the time students were leaving school for the day and to also clear the building of the school's students and send them home. On that date, and after school was out for the day, Mr. Mosley later found some fifteen students playing in the halls of one wing of the building and instructed them to leave the building. (R. 137, 138, 139, 140)

Roderick Oliver was one of these fifteen and Roderick refused to leave saying he was going to get some water. Roderick was told by Mr. Mosley that he had had plenty of time to get water and that he could get water when he got home. Whereupon, Roderick told Mr. Mosley, "Aw, fuck you." Mr. Mosley then struck Roderick with his open left hand. He did not strike the boy with his fist. (R. 139, 140, 145, 146, 148)

Mr. Mosley denies that when he struck Roderick, he was administering corporal punishment to the boy for violating a school rule; that he struck in a fit of anger; that his conduct was a reaction to an action; that his mind "kind of snapped" when the boy said what he did and that in striking the boy under those circumstances, he had taken himself out of the position of a school administrator. (R. 141, 144, 145)

At the time of trial, there was pending a criminal proceedings in a state court against Mr. Mosley for aggravated assault of an adult on a minor. (R. 140, 141)

As a result of his action in striking Roderick on this occasion, Mr. Mosley was suspended by the school system for the remainder of the school year. Mr. Mosley was re-employed as an administrative intern after the suspension ended for the next school year and assigned as administrative intern in one of the school system's high schools. (R. 142, 143, 136)

At the time of trial, the Petitioner Student, Douglas Ware, was seventeen years of age and a student at Sunset High School. (R. 79)

The Respondent, London, was Assistant Principal at Sunset High School. The Respondent, Filgo, was Principal at Sunset High School. The Respondent, Kaspareit, was the swimming coach at Sunset High School. (R. 85, 89)

Douglas can only remember two accasions when he has been spanked at Sunset. On each occasion, it was by Assistant Principal London. (R. 86, 87)

Douglas admits that on the occasions he was paddled at school, he knew the reason for which he was being punished. (R. 80) Douglas admits that on the occasions he was paddled at school, he was allowed to give an explanation or reason to the coach or the assistant principal involved concerning the matter for which he was paddled (R. 82, 83) Vice Principal London and

Douglas would talk about the matter when Douglas would be in trouble and Vice Principal London would let Douglas explain his side of the matter. (R. 83)

Douglas admits he was given the right to refuse licks. (R. 86)

The first occasion for which Douglas received licks was in punishment for making a crude noise in English class and for throwing an airplane in the English class. The second occasion arose under these circumstances. Douglas had forged a teacher's name. Given a choice between five days suspension from school or five licks. Douglas chose to be suspended from school and went home. Douglas was on the swimming team. The swimming coach called him and told him if he was suspended from school, he could not compete in the district swim meet. Douglas then elected to swim, so he returned to school and took licks in punishment for forging the teacher's name. (R. 86, 87) The licks by Vice Principal London consisted of being struck on the rear end with a wooden paddle. (R. 81)

Douglas is punished at home when he breaks the rules there. He has been spanked by his mother. He has been spanked by his father. (R. 84, 85)

This action was tried on May 12, and 13, 1971, during the school year 1970-71. (R. 53, 54) The previous school year 1969-70, Douglas was in the tenth grade and on the Sunset High School swimming team. (R. 80, 81) Mr. Kaspareit was the swimming coach at Sunset high School. Mr. Kaspareit administered licks with a tennis

shoe and a paddle to Douglas to enforce his rules for the team. (R. 128, 129)

Mr. Kaspareit gave Douglas licks for such infractions of his directions and instructions as leaving personal belongings at the swimming pool, such as a shirt or towel, not wearing a shirt in the weight room, not bringing equipment to team practice or failure to have it in order, for not bringing a physician's statement as to ability to participate in athletics, for failure to bring fees and for being late to work outs. (R. 88, 89, 129)

Unless these matters were complied with by a team member, he could not function on the team. The application of the tennis shoe was Mr. Kaspareit's way of encouraging Douglas to be prompt and attentive to these matters. Mr. Kaspareit's only alternative would have been to suspend Douglas from the team. (R. 129)

Mr. Kaspareit did not want to suspend Douglas from the team. As may well be the case in many high school athletic situations, this coach knew enough about this one boy to know that he needed the chance to participate in athletics. Mr. Kaspareit felt it was necessary for this boy to be in athletics to place him in a situation where he could mature both athletically as well as gain emotional and social growth. Mr. Kaspareit thought it would help Douglas learn to be on time, have his things in order and be a part of a competitive effort. It was for these reasons that Mr. Kaspareit chose this form of discipline rather than suspension of Douglas from the team. (R. 130)

Mr. Kaspareit was not meting out discipline for violating rules of Sunset High School or of the Dallas Independent School District. Rather, the actions taken by Mr. Kaspareit were simply a matter of how he chose to run the swimming team as a matter of coaching technique. (R. 130, 132)

Mr. Kaspareit also teaches mathematics at Sunset High School; however, he does not administer corporal punishment to students in the mathematics classes that he teaches. (R. 133, 134)

A tennis shoe is something of a symbol at Sunset High School. It is a symbol of considerable effort, of giving all you could to what you are trying to do. How the tennis shoe became such a symbol can be summarized as follows: A now deceased former basketball coach had applied a tennis shoe to the back anatomy of his basketball teams over the years. Boys on the basketball team at some point in the school's history took that tennis shoe and placed it on a ledge above the stage in the high school auditorium as a symbol of school spirit. When the auditorium was being later remodeled, some of the boys took the tennis shoe and kept it until the remodeling was complete, and they then replaced it at its place on the ledge above the stage. When that basketball coach later became very ill and while hospitalized, several of his boys went to see him and told him that he had oftentimes inspired them to superhuman efforts and they had come by the hospital to tell him that he was not going to quit on them and that he was going to give everything he had to get well. The tennis shoe represented effort at Sunset High School. (R. 149-153)

In spite of Mr. Kaspareit's efforts to keep Douglas on the team, the boy failed to keep up his grades and was unable to continue on the team for the school year 1969-70. This resulted in Douglas failing to receive a school letter for his sophomore year as a member of the school's swimming team. (R. 90) There then developed considerable controversy between Douglas and his father and the school system concerning this school letter for the sophomore year. (R. 90, 93, 94, 96, 97, 98) Douglas and his family raised no question about spankings or licks given Douglas at school until they found out that Douglas was not going to get a letter because of his grades. (R. 90)

Douglas' father never informed school officials that he did not want them to impose corporal punishment on Douglas. (R. 92, 93) Mr. Ware had always assumed that school authorities would spank Douglas when they wanted to, and Mr. Ware knew of incidents when corporal punishment had been used on Douglas in school. Mr. Ware accepted spankings as the rule. In Mr. Ware's own words concerning spankings Douglas had received, "He wasn't bleeding, I figured it was, maybe, in line." (R. 91, 92, 95, 96)

Even as of the date of Mr. Ware's testimony at the trial, Sunset High School has never received from Mr. Ware any prohibition against imposing corporal punishment on Douglas. (R. 96)

Mr. Kaspareit's judgment concerning the desirability of Douglas' participation in athletics on the swimming team was correct. Even Mr. Ware concluded that the eventual denial of the swimming letter to Douglas was

a damaging factor to Douglas and caused a further decline in the boy's grades. (R. 93)

Mr. Kaspareit was reprimanded both orally and by letter of reprimand from school authorities for licks given as coach of the swimming team. (R. 131, 134, 135)

In addition to the Petitioner Students' testimony there was also testimony from a fourteen year old junior high school student who had been paddled on two occasions by the assistant principal at his school. The first time was for disrupting a study hall after having been warned several times by the study hall teacher. The second time was for spitting out the second floor window at students below. (R. 103, 104, 105, 106, 107, 108)

In addition to the Petitioner Students' testimony there was testimony from the mother of a twelve year old elementary school student to the effect that her son had been spanked by the principal for calling his teacher a blabbermouth in class. (R. 23, 124, 125, 126)

Petitioner Students called two social scientists as witnesses. The first was Professor David Gill of Brandeis University. He is a professor of social policy. (R. 99, 100) To Professor Gill, even a child who gets his wrist slapped or his seat spanked is what he describes as a "beaten" child. However, Professor Gill would accept corporal punishment if demonstrated that corporal punishment is conducive to a child's development, and if either a father or school teacher is persuaded that a spanking is conducive to a child's

proper development, then Professor Gill accepts spanking as the lesser of two evils. (R. 101, 102) The second social scientist was Robert M. Dain, an assistant professor of psychology. (R. 110) Professor Dain concedes that there are children for whom it can be demonstrated that corporal punishment would be helpful in the long run. (R. 111)

The School District's present policy on corporal punishment was arrived at after much study and research. An administrative aid to the superintendent was assigned the task of research on the matter; a study committee of the classroom teachers was appointed; the school district's 184 building principals were consulted and their advice sought; the teachers and principals reported to the school superintendent in favor of and supporting adoption of the school district's present policy on corporal punishment. (R. 114, 117, 118)

Further, the school district's present policy on corporal punishment was arrived at after the school superintendent and school administrators heard a presentation made to a group of Dallas citizens, the school administrators and representatives from the local medical school by Dr. B. F. Skinner of Harvard University, recognized as a leading, or the foremost, psychologist in the country. (R. 115, 114, 120, 121)

School administrators concluded when Dr. Skinner's views were presented that until we reach a utopian society, we may have to use corporal punishment in public schools. (R. 122)

It is the policy of the school district that corporal punishment be used only as a last resort. However, if out of some 7,000 teachers, the district's policies on corporal punishment are violated, the persons responsible are subject to appropriate administrative action and this includes reprimand and suspension depending on the degree of the violation. (R. 116)

ARGUMENT ON REASONS FOR DENYING THE WRIT

1. *There Is No Conflict with Applicable Decisions of the Supreme Court.*

The Court of Appeals has not decided a Federal question in a way in conflict with any decision of this Court. Petitioners cite no decision of this Court deciding, suggesting or implying either directly, indirectly, inferentially or by analogy that a spanking or paddling in public schools constitutes cruel and unusual punishment under the Eighth Amendment or is a denial of a fundamental liberty secured by the Fourteenth.

No where under their reasons for granting the writ do Petitioners mention the Eighth Amendment, spanking, corporal punishment or cruel and unusual punishment. Petitioners cast their reasons for granting the writ, first, in the light of family and parental rights in very general and abstract terms, and second, in the light of students' rights as to hair and personal appearance and the wearing of black arm bands.

This case does not involve student dress codes or symbolic speech. This case does not present a concept

of family or parental rights in the sense urged by Petitioners and sought to be grounded on the cases of *Boddie v. Connecticut*, 401 U.S. 371, *Loving v. Virginia*, 388 U.S. 1, *Skinner v. Oklahoma*, 316 U.S. 535, *Meyer v. Nebraska*, 262 U.S. 390, *Pierce v. Society of Sisters*, 268 U.S. 510, *Prince v. Massachusetts*, 321 U.S. 158, *Griswold v. Connecticut*, 381 U.S. 479, *Stanley v. Illinois*, 405 U.S. 645, and *Board of Regents v. Roth*, 33 L.Ed.2d 548, cited by Petitioners.

The decision of the Court below as bearing on whether corporal punishment in public schools is a deprivation of a right secured by the Constitution is not in conflict with this Court's decisions in such cases that a state denies due process to indigent persons by refusing to permit them to bring divorce actions except on payment of certain fees and costs (*Boddie*); that a state's statutory scheme to prevent marriages between persons solely on the basis of racial classifications violates the equal protection and due process clause (*Loving*); that a state statute providing for sterilization of certain habitual criminals violates the equal protection clause (*Skinner*); that a state statute forbidding the teaching in school of any other than the English language until the pupil had passed the eighth grade is a denial of due process (*Meyer*); that a state statute requiring all children between certain ages to attend a public school is a denial of due process (*Pierce*); that a state statute prohibiting children under certain ages from selling certain items or exercising certain trades in any state or public place was not a denial of religious freedom or equal protection (*Prince*); that a state's statutory scheme making the

use of contraceptives and information, instruction and medical advice as to the means of preventing conception a criminal offense is a denial of constitutional rights (*Griswold*); that a state's statutory scheme that did not afford unwed fathers a hearing on their fitness before their children were taken from them was a denial of due process (*Stanley*); and that a state's failure to afford a hearing prior to nonrenewal of a nontenured state teacher's contract, absent a showing that the nonrenewal deprived him of "liberty" or "property", was not a denial of due process (*Roth*).

Petitioner's argument would rule out any penalty or discipline, criminal or otherwise, sought to be imposed by society upon an individual should that individual establish that he or his family was *opposed* to the particular sanction in question. The existence of a right secured by the Constitution does not turn on the citizen's individual choice and selection. No case cited by the Petitioners supports Petitioners' contention that a constitutional right arises merely from *individual opposition* of a person or parent to an act of the state. In fact one of the cases relied on by Petitioners clearly negatives this novel theory here advanced by Petitioners. In *Prince* this Court points out that the authority of the state is not nullified merely because the parent grounds his claim on conscience. 321 U.S. 158, at p. 166.

2. *There Is No Conflict of Decisions Between Courts of Appeal.*

No other Court of Appeals has rendered a decision on this matter. Respondents know of no cases involv-

ing the constitutional arguments here made involving corporal punishment of students other than the instant case and the case of *Sims v. Board of Education of the Independent School District No. 22*, 329 F.Supp. 678 (New Mex.). The District Court in the latter case, as in the instant case, decided this very issue in favor of the school authorities. On Appeal of the District Court's decision in *Sims* the Court of Appeals for the Tenth Circuit dismissed the case on the motion of the appellee-school district. (Appendix "A").

3. *The Facts of This Case Do Not Support Petitioners' Own Concept of Their Alleged Constitutional Rights.*

Contrary to Petitioners' assertions, we are not here concerned with the parents' right to bring up their offspring according to their own precepts and convictions. Rather we are concerned with a method of discipline of minor students who misbehave in school while away from the control of their parents.

In any event there is no conflict under the facts of this case between the precepts and convictions of the petitioning parents regarding spanking and that of school personnel. Both sets of parents have themselves spanked these particular students at home, one father has authorized school authorities to paddle his son and the other father has known his son was paddled at school and feels his son deserved it.

If corporal punishment is the wrong, constitutional or otherwise, urged by Petitioners, then the attitudes of the parents of both Roderick Oliver and Douglas Ware should be noted, both from the standpoint of

the attitudes of the parents and in determining their representation of the class sought to be represented in this class action permitted by the District Court.

Roderick has been spanked with a belt at home on more than one occasion by both his mother and father and Roderick's father has used a paddle on Roderick at home. Likewise Douglas has been spanked at home by both his mother and his father.

Roderick's father has given specific permission to the school system including its principals, teachers and its superintendent to spank or paddle Roderick while he is in the school system's jurisdiction at any time it was thought that Roderick was justified in receiving punishment, including spanking.

Douglas's father raised no question about corporal punishment given Douglas until it was discovered that Douglas would not receive his swimming letter because of his academic grades. Douglas' father never informed school officials he did not want them to impose corporal punishment on Douglas. Douglas' father knew corporal punishment had been used on Douglas in school and figured it was, maybe, in line; i.e., Douglas probably deserved it. Even as of the date of his testimony, Douglas' father has never prohibited anyone at the school from imposing corporal punishment on Douglas.

Petitioners do not allege a deprivation of a constitutional right by virtue of corporal punishment in general on behalf of all students in the school system.

Petitioners contend for a unique form of constitutional right, i.e., a right that exists only as to those who oppose a particular form of alleged state action, to-wit, corporal punishment. Thus, it is not the *act* of corporal punishment that constitutes the alleged deprivation of a constitutional right, rather it is the *opposition* of a particular person to that act that creates the alleged constitutional right. This concept reduces the existence of a constitutional right to the personal views and preferences of each individual, and the difficulties confronting public authorities and Courts in determining the existence of a constitutional right become enormous.

Under this novel constitutional theory advanced by Petitioners, public school officials would be unable to decide whether any particular action undertaken by them would constitute a deprivation of a constitutional right of a student unless and until it was first determined by the school authorities whether or not a particular student and his family opposed the action about to be taken. Constitutional rights are not that flexible a concept.

The facts of this case establish that both these parents have used corporal punishment on these students at home, that one has given school authorities permission to spank or paddle his son, that another figures his son probably deserved paddlings he got at school. From this it would appear that Petitioners' *opposition* to corporal punishment is not in fact sufficiently strong to form the basis of the alleged constitutional right.

4. *There Is No Important Question of Federal Law.*

This case concerns a form of punishment or discipline imposed upon a public school student who breaks school rules. Punishment for the exercise of a First Amendment freedom is not involved. The punishment involved does not involve any important questions of Federal law, and there is so issue or question to be disposed of by this Court.

If discipline as such of a State's public school students is to be a deprivation of a right secured by the Constitution (other than as punishment for the exercise of First Amendment freedoms), then the Federal Courts, under 42 U.S.C. Section 1983, will be called upon at some point to decide substantive due process questions and Eighth Amendment rights involving among other things: suspension from school, detentions, writing "I will not * * *" on the blackboard the prescribed number of times, the award of letter sweaters for sports, and extra laps for the football team when practice is less than satisfactory, to name but a few. Also, in each such instance the Court will be required to consider the particular discipline in the light of the nature of the punishment, the offense for which the punishment is administered, the age of the pupil, the physical condition of the pupil, the teacher or principal's motive, and the opinions of the "experts" as to the particular effect on the particular child of the discipline at issue.

As suggested by both the Courts below and by the District Court in *Sims v. Board of Education of the In-*

dependent School District No. 22, supra, p. 690, and by this Court in *Epperson v. Arkansas*, 393 U.S. 97, 104, it is desirable that the Courts do not become overly involved in operating public school systems.

No rights secured by the Constitution are lost to Petitioners by school discipline such as corporal punishment. Petitioners do not ask this Court to look at particular facts surrounding punishment given and then conclude that under those facts a student has been cruelly and unusually punished. Petitioners ask the Court to decide that the mere event or circumstance of corporal punishment is a constitutional wrong regardless of the means or force used. In short, the Petitioners seek a judicial determination that a circumstance to which they are philosophically and emotionally opposed, whatever be the surrounding facts, is not permitted by the Constitution.

Rights claimed under the Eighth Amendment are not involved as no criminal conduct or statute is involved. *Powell v. Texas*, 392 U.S. 514, 532.

Petitioners have been deprived of no substantive rights under the Fourteenth Amendment, as the Fourteenth Amendment provides no substantive rights to be free of discipline in the public schools of a state. Respondents submit that protection of a student from spanking by a teacher was certainly not one of the rights sought to be provided by legislators considering the Fourteenth Amendment and the Civil Rights Act shortly after the Civil War.

But even if the Eighth Amendment does apply where no criminal conduct or statute is involved, Petitioners have not been subjected to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

The school system's present policy on corporal punishment was not arrived at by whim; much study and research went into the policy. An administrative aid to the school superintendent was assigned to research the matter; the school system's teachers and principals were consulted and their advice sought, and these two groups recommended in favor of the present policy. The views of psychologists and others were considered in formulating the policy. Even with such a policy, it is used only as a last resort, and if abused by school personnel, appropriate administrative action is taken. As Douglas Ware pointed out, corporal punishment is not administered over the opposition of the students. Students are given the right to refuse licks.

If the corporal punishment shown by this record was harmful in the sense urged by Petitioners, the tennis shoe at Sunset High School would not have become a symbol of school spirit, competitiveness and giving all you could. Nor would it be treated as it was by some of the very boys receiving its attention. If Douglas Ware would voluntarily end a suspension from school and return and take licks in lieu of his suspension, then the wrongs of corporal punishment as seen by Petitioners are not shown. If Roderick Oliver and the other boys in a wood shop class can recognize the matter as being something they would laugh off and not get mad

about, then the objections to corporal punishment asserted by Petitioners do not rise to the level of an important question of Federal law.

If corporal punishment is the wrong asserted by Petitioners, they would have filled this record with facts showing the seriousness of the punishment imposed from the standpoint of the extent and severity of the paddlings and the adverse medical circumstances resulting. This they failed to do.

Here there is no question of race or other classification of persons, and no charge of an uneven, selective and arbitrary regulation applied sparsely, selectively and spottily to unpopular groups as would be incompatible with the concept of equal protection. Here the spanking or paddling is not shown to offend human dignity or to have been wantonly and freakishly imposed. Here there can be no question that the punishment is so infrequently imposed as to render its use unconstitutional because Petitioners by the urgency and force of their attempted class action insist that corporal punishment occurs all too frequently. Here there is no showing that corporal punishment is excessive or that it is morally unacceptable to the people of the United States at this time in their history. Cf. *Furman v. Georgia*, ____ U.S. ____, 33 L.Ed.2d 346.

Conditions in the Dallas school system on this record have not been shown to be so base, inhuman and barbaric or so shocking to the conscience as would establish a violation of the Eighth and Fourteenth Amendments.

Rights under the First Amendment are not here involved as they would be in those cases where acts, conduct and symbols are claimed to be speech and expression. This case is not concerned with First Amendment freedoms. Thus *Tinker v. Des Moines Community School District*, 393 U.S. 503, would not be applicable as the discipline by way of suspension there involved was determined to be discipline for the exercise of a protected constitutional right. Misbehavior is not a First Amendment freedom.

Rights under the Equal Protection Clause would not here be involved. Equal protection is concerned with the making of classifications and an invidious discrimination against a particular class. Here no classification is made and no discrimination exists. A regulation rationally based and free of "invidious discrimination" does not violate the Equal Protection Clause, and the Fourteenth Amendment gives the Federal Courts no power under the Equal Protection Clause to impose upon the states their views of what constitutes wise social policy. *Dandridge v. Williams*, 397 U.S. 471, 486, 487. Certainly a state of facts reasonably may be conceived to justify the regulation in question and the Equal Protection Clause permits a wide scope of discretion in passing laws which affect some groups of citizens differently than others. *McGowan v. Maryland*, 366 U.S. 420, 426. The regulation in question is reasonably and rationally based on protecting the educational process and is not a hateful distinction. The Petitioners have not been denied equal protection.

Contrary to Petitioners' contention, rights under the Ninth Amendment are not here involved. There is no constitutional right of privacy or to be let alone applicable to public school students within the meaning of *Griswold v. Connecticut*, supra. Attendance in public education is involvement in the public's business and affairs in a public place; birth control practices in the privacy of one's bedroom are not.

There has been no denial of procedural due process. Roderick admits that at the time he received spankings he knew the reason he was being punished and that each time he received a spanking or paddling he was allowed to give an explanation for all his actions for which he was punished. Douglas also admits that on the occasions he was paddled, he knew the reason he was being punished and that on each occasion he was allowed to give an explanation or reason concerning the matter. School regulations are not to be measured by the standards which prevail for criminal law and procedure. *Esteban v. Central Missouri State College*, 415 F.2d 1077, C.A. 8, Cert. denied, 398 U.S. 965. Written notice of the charges, representation by an attorney and cross-examination of witnesses would require inappropriate time and effort as to this particular discipline under the facts of this case. *Farrell v. Joel*, 437 F.2d 160, C.A. 1. The minimal procedural requirements of due process have been met in the light of the nature of the sanction and the procedure used in imposing that sanction.

Persons may differ on whether corporal punishment is a proper means for correcting those students who,

for example, disregard safety rules in wood shop, are guilty of general misbehavior, make crude noises in class, throw airplanes in class, forge a teacher's name, disrupt study halls, spit out the windows at other students and call a teacher a blabbermouth.

However, and regardless of one's feeling as to "spare the rod and spoil the child", the Federal Court House is not the proper forum for a decision on that issue. School board elections and school board meetings are. As pointed out by the Chief Justice's concurring opinion in *Palmer v. Thompson*, 403 U.S. 217, 228:

> "But all that is good is not commanded by the Constitution and all that is bad is not forbidden by it."

The two social scientists called by Petitioners concede that corporal punishment is not all bad. If father or teacher is persuaded that a spanking helps in a child's proper development, then it is the lesser of two evils according to one of Petitioners' witnesses and the other even recognized that there are children for whom it can be demonstrated that corporal punishment is helpful in the long run.

As to punishment at home, the parents are more qualified to make the necessary judgments in this area than are the Federal Courts.

As to punishment at school, teacher and principal are more qualified to make the necessary judgments in this area than are the Federal Courts.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WARREN WHITHAM,
210 Adolphus Tower,
Dallas, Texas 75202,
Attorney for Respondents.

Dated: October 9, 1972

PROOF OF SERVICE

I, Warren Whitham, Attorney for Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of October, 1972, I served three copies of the foregoing Respondents' Brief in Opposition to Petition for Writ of Certiorari upon Fred Time, Esq., Legal Arts Center, 600 Jackson Street, Dallas, Texas 75202, Attorney of Record for the Petitioners, by mailing same to such address by depositing the same in a United States mail box in an envelope properly addressed at such address with first class air mail postage prepaid.

WARREN WHITHAM,
Attorney for Respondents.

APPENDIX "A"

JANUARY TERM — FEBRUARY 24, 1972

Before Honorable Delmas C. Hill and Honorable Robert H. McWilliams, Circuit Judges

No.71-1643

ZEBEDIAH SIMS, a minor, on behalf of himself and all other persons similarly situated, through his parents and general guardians CHARLIE SIMS and HELEN SIMS,
Plaintiffs-Appellants,

versus

BOARD OF EDUCATION OF THE INDEPENDENT SCHOOL DISTRICT NO. 22, et al.,
Defendants-Appellees.

This matter comes on for consideration of appellees' motion to dismiss the appeal and appellants' opposition to said motion together with the reply of appellees to said opposition.

Upon consideration whereof, it is

ORDERED that the case is dismissed.

Appellees' motion for extension of time to file a brief is now moot.

This ORDER shall constitute the mandate of the Court.

(Signed) HOWARD K. PHILLIPS
HOWARD K. PHILLIPS
Clerk

/s/ [ILLEGIBLE]
Deputy Clerk